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Soo Teck Lee & Ors v Lim Geok Kim & Ors

B HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO WA-22NCVC–134–03 OF 2019
MOHD NAZLAN J
11 OCTOBER 2021

C *Civil Procedure — Striking out — Writ and statement of claim — Whether defendant had shown on balance of probabilities that suit against her revealed no cause of action and was frivolous and vexatious and an abuse of process of court — Whether withdrawal of claim by two of the five plaintiffs in the suit deprived the remaining plaintiffs of locus standi to continue with the suit — Whether* D *defendant had shown that plaintiffs' claim against her was founded on a lie and was completely devoid of merit and unsustainable — Whether estoppel operated to prevent plaintiffs from continuing with their inequitable conduct*

E The five plaintiffs had jointly agreed under a sale and purchase agreement ('SPA') to buy the defendant's land for RM1.5m. In their instant suit, the plaintiffs claimed that although they had paid the purchase price, the defendant had failed to fulfill her obligation under the SPA to deposit the original copy of the issue document of title ('IDT') to the land with the F plaintiffs' solicitors to enable the transfer of ownership of the land to be made and that, as a result, they were entitled to terminate the SPA and obtain from the defendant a refund of the purchase price and an equivalent sum of RM1.5m as agreed liquidated damages. In her defence and counterclaim, the defendant pleaded that the SPA was a sham and was in reality a 'security' for the G plaintiffs to buy another piece of land. The first and second plaintiffs subsequently withdrew their claim against the defendant and affirmed an affidavit agreeing with the defendant's version of what the SPA actually was and stating that they no longer supported the stand taken by the other plaintiffs in the suit. The defendant applied under O 18 r 19 of the Rules of Court 2012 to H strike out the writ and statement of claim on the ground that: (a) the withdrawal of the claim by the first and second plaintiffs caused the remaining plaintiffs to no longer have locus standi to continue to maintain the suit; and (b) the suit itself was founded on an untrue premise and therefore failed to disclose a reasonable cause of action against the defendant and was also I frivolous and vexatious and an abuse of process of the court.

Held, allowing the striking out application:

(1) The defendant had more than succeeded on balance of probabilities to show that the writ action by the remaining three plaintiffs against her was

vexatious, frivolous and an abuse of process. Their claim was so obviously unsustainable that it had to be struck out (see paras 49–50).

(2) The five original plaintiffs in the suit jointly agreed as vendors under the SPA to buy the whole of the undivided interest of the defendant in her land. It was therefore not legally possible — after the first and second plaintiffs withdrew their claims — for the third, fourth and fifth plaintiffs to maintain and continue with the suit against the defendant for the reliefs that they claimed. All the five plaintiffs had an undivided interest in the land and a corresponding stake in the aggregate payment of the RM3m that they claimed from the defendant. Any claim against the land under the SPA had to be jointly maintained by all the five plaintiffs. Without the involvement of the first and second plaintiffs, the third, fourth and fifth plaintiffs alone did not have the requisite locus standi to maintain and continue with the suit as the interests under the SPA in relation to the land was undivided and jointly held by all the five plaintiffs who made up the entire collective co-purchaser group against the defendant. The continued pursuit of the suit by the three remaining plaintiffs meant they were maintaining a frivolous and vexatious action besides committing an abuse of process of the court (see paras 22–24 & 26–29).

(3) A more significant reason for the court to find the suit unsustainable was the fact that all the five plaintiffs had previously decided to terminate the SPA and return the original copy of the IDT to the said land to the defendant as revealed in a letter from their solicitors dated 16 October 2017. The first and second plaintiffs had also averred in their affidavit that the SPA was merely a security for the purchase of another piece of land ('Land A') and was never intended to be enforceable between the parties. The SPA was not a genuine agreement and when a caveat on Land A was removed, all the original plaintiffs signed a letter dated 16 October 2017 to terminate the SPA and cause the original copy of the IDT to the land to be returned to the defendant. In the light of these averments, well-substantiated by clear documentary support, not only was the claim in the suit made by the remaining plaintiffs devoid of merit but the commencement of this suit subsequent to the termination of the SPA and the return of the IDT was unsustainable. The very foundation of the entire claim in the suit was that the defendant had allegedly failed to deposit the IDT to enable the land to be transferred to the plaintiffs. But this whole premise was now revealed to be an absolute untruth. Estoppel operated to prevent and disapprove of the inequitable conduct of the plaintiffs (see paras 30–38).

(4) There was no evidence to show that the termination of the SPA by the plaintiffs was conditional in any way; nor was there any evidence to show that the plaintiffs had made any payment towards the purchase

consideration of the said land under the SPA. The plaintiffs failed to produce any evidence to resist the defendant's striking out application. Mere bare denials or assertions did not constitute evidence and could not give rise to triable issues (see paras 39–40, 42–43 & 48).

[Bahasa Malaysia summary

Kelima-lima plaintif telah bersetuju secara bersesama di bawah perjanjian jual beli ('PJB') untuk membeli tanah defendan dengan harga RM1.5 juta. Di dalam tindakan ini, plaintif-plaintif memplidkan bahawa walaupun mereka telah membayar harga pembelian, defendan telah gagal memenuhi kewajipannya di bawah PJB untuk mendepositkan salinan asal dokumen pengeluaran hakmilik ('DPH') hartanah tersebut dengan peguamcara plaintif untuk membolehkan pemindahan pemilikan tanah dibuat. Akibatnya, mereka berhak untuk menamatkan PJB dan memperoleh kembali bayaran balik harga belian dan jumlah sebanyak RM1.5 juta seperti yang dipersetujui sebagai ganti rugi. Dalam pembelaan dan tuntutan balasnya, defendan mengakui bahawa PJB tersebut adalah tidak berkesan dan pada hakikatnya adalah 'jaminan' bagi plaintif-plaintif untuk membeli hartanah lain. Plaintif pertama dan kedua kemudiannya menarik balik tuntutan mereka terhadap defendan dan mengesahkan afidavit yang bersetuju dengan versi defendan tentang tujuan PJB tersebut dan menyatakan bahawa mereka tidak lagi menyokong pendirian yang diambil oleh plaintif lain di dalam saman tersebut. Defendan memohon di bawah A 18 k 19 Kaedah-Kaedah Mahkamah 2012 untuk membatalkan writ dan pernyataan tuntutan atas alasan bahawa: (a) penarikan balik tuntutan oleh plaintif pertama dan kedua menyebabkan plaintif-plaintif lain tidak lagi mempunyai locus standi untuk mengekalkan saman tersebut; dan (b) saman tersebut berdasarkan premis yang salah dan oleh itu gagal mendedahkan sebab yang munasabah tindakan terhadap defendan dan juga remeh dan menjengkelkan dan merupakan satu penyalahgunaan proses mahkamah.

Diputuskan, membenarkan permohonan pembatalan saman:

(1) Defendan telah berjaya melebihi keseimbangan kebarangkalian dengan menunjukkan bahawa tindakan writ oleh tiga plaintif yang lain terhadapnya adalah remeh dan merupakan satu penyalahgunaan proses mahkamah. Tuntutan plaintif yang lain adalah jelas tidak dapat dikekalkan dan harus dibatalkan (lihat perenggan 49–50).

(2) Lima plaintif asal dalam saman tersebut secara bersama bersetuju sebagai vendor di bawah PJB untuk membeli keseluruhan kepentingan defendan di hartanahnya. Oleh itu, tidak mungkin dari segi undang-undang — selepas plaintif pertama dan kedua menarik balik tuntutan mereka — untuk plaintif ketiga, keempat dan kelima untuk mengekalkan dan meneruskan saman terhadap defendan untuk relif yang dituntut. Kelima-lima plaintif mempunyai kepentingan yang tidak berbelah bahagi ke atas hartanah tersebut dan kepentingan bayaran RM3 juta

yang dituntut daripada defendan. Sebarang tuntutan terhadap hartanah di bawah PJB tersebut perlu dikekalkan bersama oleh kelima-lima plaintif. Tanpa penglibatan plaintif pertama dan kedua, plaintif ketiga, keempat dan kelima tidak mempunyai locus standi yang diperlukan untuk mengekalkan dan meneruskan saman tersebut kerana kepentingan di bawah PJB berhubung dengan hartanah tersebut tidak berbelah bahagi dan dipegang bersama oleh kelima-lima plaintif yang membentuk keseluruhan kumpulan pembeli kolektif terhadap defendan. Saman tersebut oleh ketiga-tiga plaintif yang lain merupakan satu tindakan remeh dan merupakan satu penyalahgunaan proses mahkamah (lihat perenggan 22–24 & 26–29).

(3) Alasan yang lebih penting bagi mahkamah untuk mendapati saman tersebut tidak dapat dipertahankan ialah kelima-lima plaintif sebelum ini telah memutuskan untuk menamatkan PJB dan mengembalikan salinan asal DPH kepada tanah tersebut kepada defendan seperti yang dinyatakan dalam surat daripada peguam mereka bertarikh 16 Oktober 2017. Plaintif pertama dan kedua juga telah bersetuju dalam afidavit mereka bahawa PJB tersebut hanyalah jaminan untuk pembelian sebidang tanah lain ('Land A') dan tidak pernah dimaksudkan untuk dikuatkuasakan antara pihak-pihak. PJB tersebut bukan perjanjian yang tulen dan apabila kaveat di Tanah A dikeluarkan, semua plaintif asal menandatangani surat bertarikh 16 Oktober 2017 untuk menamatkan PJB dan menyebabkan salinan asal DPH ke tanah tersebut dikembalikan kepada defendan. Berdasarkan keterangan ini, dibuktikan dengan keterangan dokumentari menunjukkan bahawa tuntutan dalam saman yang dibuat oleh plaintif yang lain tidak mempunyai merit kerana penamatan PJB dan pemulangan ID tersebut. Asas keseluruhan tuntutan dalam saman tersebut adalah bahawa defendan gagal mendepositkan DPH untuk membolehkan tanah tersbut dipindahkan kepada plaintif. Namun, perkara tersebut telah dibuktikan sebagai tidak betul. Plaintif yang lain diestop untuk melakukan meneruskan tindakan yang tidak berekuiti ini (lihat perenggan 30–38).

(4) Tiada keterangan untuk menunjukkan bahawa penamatan PJB oleh plaintif adalah bersyarat; tiada keterangan untuk menunjukkan bahawa plaintif telah membuat apa-apa bayaran terhadap pembelian tanah tersebut menurut PJB tersebut. Plaintif-plaintif telah gagal mengemukakan sebarang keterangan untuk membantah permohonan defendan. Penafian atau dakwaan semata-mata bukanlah satu keterangan dan ianya tidak dapat menimbulkan isu-isu yang boleh dibicarakan (lihat perenggan 39–40, 42–43 & 48).]

Cases referred to

Affin Bank Bhd v Eye Bee Sdn Bhd [2005] 7 MLJ 1, HC (refd)
American Cyanamid Co v Ethicon Ltd [1975] AC 396, HL (refd)

Bakti Dinamik Sdn Bhd v Bauer (M) Sdn Bhd [2016] MLJU 1878; [2016] 10 CLJ 247, HC (refd)
Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36, SC (refd)
Bank Negara Malaysia v Mohd Ismail & Ors [1992] 1 MLJ 400, SC (refd)
Chen Heng Ping & Ors v Intradagang Merchant Bankers (M) Bhd [1995] 2 MLJ 363, CA (refd)
Harapan Permai Sdn Bhd v Sabah Forest Industries Sdn Bhd [2011] 2 MLJ 192, CA (refd)
Jasa Keramat Sdn Bhd & Anor v Monatech (M) Sdn Bhd [1999] 4 MLJ 637, CA (refd)
KGN Jaya Sdn Bhd v Pan Reliance Sdn Bhd [1996] 1 MLJ 233, CA (refd)
Metroplex Holdings Sdn Bhd v Commerce International Merchant Bankers Bhd [2013] 4 MLJ 520, CA (refd)
Raja Zainal Abidin bin Raja Haji Tachik & Ors v British-American Life & General Insurance Bhd [1993] 3 MLJ 16, SC (refd)
See Thong & Anor v Saw Beng Chong [2013] 3 MLJ 235; [2013] 3 AMR 385, CA (refd)
Seruan Gemilang Makmur Sdn Bhd v Kerajaan Negeri Pahang Darul Makmur & Anor [2016] 3 MLJ 1; [2016] 2 MLRA 263, FC (refd)
Supuletchimi v Palmco Bina Sdn Bhd [1994] 2 MLJ 368, HC (refd)
Yong Lai Ling (P) lwn Ng Seow Poe dan lain-lain [2015] 8 MLJ 351, HC (refd)

Legislation referred to

Rules of Court 2012 O 18 rr 19, 19(1), (1)(a), (1)(b), (1)(d), 19(2)

Jenny Lim (Ewe Chong & Khoo) for the first and second plaintiff.
Chua Boon Hock (representing himself) for the third plaintiff.
Lim Kien Huat (representing himself) for the fourth plaintiff.
Chua Yok Sin (representing himself) for the fifth plaintiff.
Justin Voon (Christina Chin with him) (Justin Voon Chooi & Wing) for the respondent.

Mohd Nazlan J:

INTRODUCTION

[1] This was an application by the defendant in the main action to strike out the writ and the statement of claim filed by the plaintiffs under O 18 r 19(1)(a), (b) or (d) of the Rules of Court 2012 ('the RC 2012').

[2] At the conclusion of the hearing which was conducted via zoom remote communication technology, I allowed the application and provided the principal grounds for the same. This judgment contains the full reasons for my decision.

KEY BACKGROUND FACTS

[3] The present suit was originally initiated by the five plaintiffs against the sole defendant. The defendant and two others then filed a counterclaim against the five plaintiffs. However, the first and second plaintiffs have since withdrawn their claim against the defendant. This striking out application, documented in encl 95, is therefore made against the remaining three plaintiffs.

[4] At the heart of the dispute is a piece of land held under Geran Mukim 102, Lot 343, Tempat Sungai Gadih, Mukim Kerling, Daerah Hulu Selangor, Negeri Selangor ('the said land'). Pursuant to a sale and purchase agreement dated 24 February 2016 the five original plaintiffs, as purchasers, agreed to purchase the said land from the defendant, as the vendor, for a purchase consideration of RM1.5m ('the SPA').

[5] The case of the plaintiffs in essence is that in accordance with the terms of the SPA, the defendant was required to deposit the original copy of the issue document of title to the said land with the solicitors for the purchasers (the plaintiffs), in order to enable the transfer process to be undertaken. Any failure by the vendor (the defendant) to honour this obligation would entitle the purchasers to terminate the SPA upon which the vendor must return all payments made by the purchasers under the same.

[6] The plaintiffs pleaded that despite having paid the purchase price, the defendant as the vendor failed to deposit the title document. This resulted in the plaintiffs issuing a termination letter on 19 February 2019 demanding the return from the defendant of the purchase price of RM1.5m as well as agreed liquidated sum of another RM1.5m. This led to the original five plaintiffs commencing this action.

[7] The defendant however in his defence and counterclaim pleaded that the SPA in respect of the said land was a sham since it was designed only to be a 'security' and not for the purposes of any actual sale and purchase. The defendant and the two other parties in the counterclaim alleged that four other sale and purchase agreements are also similarly sham agreements and prayed for all these agreements to be declared null and void. At the same time the defendant filed the instant striking out application.

[8] Before I proceed to examine the grounds for the striking out as advanced by the defendant, and the arguments posited by the three remaining plaintiffs, it is useful that the law on striking out be stated, albeit in summary fashion.

A THE LAW ON STRIKING OUT — A SUMMARY

[9] The starting point of reference must be O 18 r 19(1) of the Rules of Court 2012 ('the RC 2012') which relevant provisions read as follows:

B 19 Striking out pleadings and endorsements (O 18 r 19)

(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement, of any writ in the action, or anything in any pleading or in the endorsement, on the ground that —

C (a) it discloses no reasonable cause of action or defence, as the case may be;

(b) it is scandalous, frivolous or vexatious;

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the Court,

D and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

(2) No evidence shall be admissible on an application under subparagraph (1) (a) ...

E **[10]** The defendant grounded its application on limbs (a), (b) and (d) of O 18 r 19(1). It was thus stated that the writ action did not disclose a reasonable cause of action, was frivolous, vexatious and otherwise tantamount to an abuse of court process.

F **[11]** The leading authority on O 18 r 19(1) is the Supreme Court decision in *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36, and in particular, in the following part of the judgment of Mohamed Dzaiddin SCJ (later Chief Justice):

G The principles upon which the court acts in exercising its power under any of the four limbs of O 18 r 19(1) of the Rules of the High Court are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule (per Lindley MR in *Hubbuck v Wilkinson* [1899] 1 QB 86, p 91), and this summary procedure can only be adopted when it can be clearly seen that a H claim or answer is on the face of it 'obviously unsustainable' (*Attorney-General of Duchy of Lancaster v L & NW Ry Co* [1892] 3 Ch 274 (CA)). It cannot be exercised by a minute examination of the documents and facts of the case, in order to see whether the party has a cause of action or a defence (*Wenlock v Moloney* [1965] 1 WLR 1238; [1965] 2 All ER 871 (CA)). The authorities further show that if there I is a point of law which requires serious discussion, an objection should be taken on the pleadings and the point set down for argument under O 33 r 3 (which is in *pari materia* with our O 33 r 2 Rules of the High Court) (*Hubbuck v Wilkinson*). The court must be satisfied that there is no reasonable cause of action or that the claims are frivolous or vexatious or that the defences raised are not arguable.

[12] It is therefore well established that the power of the court to strike out under the four grounds of O 18 r 19(1) is to be exercised when it can clearly be determined that a claim or answer is prime facie obviously unsustainable (see also the Court of Appeal decision of *Metroplex Holdings Sdn Bhd v Commerce International Merchant Bankers Bhd* [2013] 4 MLJ 520). It is also only to be invoked sparingly (see *Affin Bank Bhd v Eye Bee Sdn Bhd* [2005] 7 MLJ 1).

[13] More relatively recently, the Federal Court in *Seruan Gemilang Makmur Sdn Bhd v Kerajaan Negeri Pahang Darul Makmur & Anor* [2016] 3 MLJ 1; [2016] 2 MLRA 263 further reaffirmed the position and held:

> [25] The principles for striking out pleadings pursuant to O 18 r 19 of the ROC are well settled. It is only in a plain and obvious case that recourse should be had to the summary process under this rule; and this summary process can only be adopted when it can clearly be seen that a claim on the face of it is obviously unsustainable (see: *Bandar Builder*, *Hubbuck & Sons Ltd v Wilkinson, Heywood & Clard Ltd* [1899] 1 QB 86 and *Attorney-General of the Duchy of Lancaster v London and North Western Railway Company* [1892] 3 Ch 274).
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> [26] The tests for striking out application under O 18 r 19 of the ROC, as adopted by the Supreme Court in *Bandar Builder* are, inter alia, as follows: (a) it is only in plain and obvious cases that recourse should be had to the summary process under the rule; (b) this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it *'obviously unsustainable'*. (Emphasis added); (c) it cannot be exercised by a minute examination of the documents and facts of the case in order to see whether the party has a cause of action or a defence; (d) if there is a point of law which requires serious discussion, an objection should be taken on the pleadings and the point set down for argument under O 33 r 3 of the ROC; and (e) The court must be satisfied that there is no reasonable cause of action or that the claims are frivolous or vexatious or that the defences raised are not arguable.
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> ...
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> [28] The basic test for striking out as laid down by the Supreme Court in *Bandar Builder* is that the claim on the face of it must be 'obviously unsustainable'. The stress is not only on the word 'unsustainable' but also on the word 'obviously', ie the degree of unsustainability must appear on the face of the claim without having to go into lengthy and mature consideration in detail. If one has to go into lengthy and mature consideration in detail of the issues of law and/or fact, then the matter is not appropriate to be struck out summarily. It must be determined at trial.
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> [29] The established rule on this point is that the court should not examine the evidence in this summary proceedings in such a way as to amount to conducting a trial on the conflicting affidavit evidence. As rightly said by Lord Diplock in the House of Lords in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 at p 407:
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> > ... The Court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried. It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may

A ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial ...

B **[14]** It is also well settled that as for limb (a), and as stated in O 18 r 19(2) above, examination could only be made of the pleadings, not the affidavits evidence, but where the application is premised on more than one ground under O 18 r 19(1), like in the present case, the court should ignore the affidavits affirmed in relation to the other grounds when dealing with limb (a) which ought to be considered first, before examining the affidavit evidence C under the other limbs (*See Thong & Anor v Saw Beng Chong* [2013] 3 MLJ 235; [2013] 3 AMR 385).

D **[15]** A claim is considered to be scandalous, frivolous or vexatious if it is wholly unnecessary and irrelevant, and in the manner explained in the case of *Harapan Permai Sdn Bhd v Sabah Forest Industries Sdn Bhd* [2011] 2 MLJ 192 which held that 'scandalous' generally refers to matters which improperly causes a derogatory light on someone, usually a party to the action, with respect to moral character, and not just unpleasant allegations.

E **[16]** The words 'frivolous or vexatious' mean a case which is obviously frivolous or vexatious or obviously unsustainable (see *Mallal's Supreme Court Practice* (2nd Ed, Vol 1). In the case of *American Cyanamid Co v Ethicon Ltd* [1975] AC 396, Lord Diplock stated that a claim is not frivolous or F vexatious where a serious question to be tried has been raised. Where there are issues of fact and law that require investigation and mature consideration after hearing full argument, then it could not be said that the subject matter of the striking out application before the court was frivolous or vexatious.

G **[17]** It is otherwise an abuse of process of the court where the process of the court has not been used in a bona fide manner and has been abused. And it is equally clear as it is practical that the situations that could fall within the categories under limb (d) are never closed given the variety of circumstances arising from the facts of each particular case. The categories of cases where the H process of the court could be abused are varied as they are numerous. They are non-exhaustive (see the Court of Appeal decision in *Jasa Keramat Sdn Bhd & Anor v Monatech (M) Sdn Bhd* [1999] 4 MLJ 637).

[18] And, as established by the Supreme Court in *Raja Zainal Abidin bin* I *Raja Haji Tachik & Ors v British-American Life & General Insurance Bhd* [1993] 3 MLJ 16, the courts have the inherent jurisdiction to prevent an abuse of its process.

Evaluation and findings of this court

[19] The defendant furnishes a number of grounds, not entirely unrelated to one another, to support its request to this court to have the claim of the plaintiffs struck out under Order 18 r 19(1)(a), (b) and (c). I shall now examine them, one after the other.

Whether the three remaining plaintiffs have the requisite locus standi to institute this suit

[20] The major contention of the defendant is that the plaintiffs' action ought to be struck out because the latter do not have any legal standing or locus standi to file the main suit since the remaining plaintiffs are merely three out of the five who are the collective joint purchasers under the SPA for the said land.

[21] There is in my view much substance in this contention. First, the other two co-purchasers, who as stated earlier were previously the first and second plaintiffs in this suit had affirmed in an affidavit that they no longer supported the stand taken by the three remaining plaintiffs.

[22] It bears emphasis that the said land was jointly purchased by all five purchasers who were the original plaintiffs in this suit. It is to be observed that Recital C to SPA referred the five plaintiffs collectively as 'the Purchaser'.

[23] It is therefore not legally possible for only three of the purchasers (the remaining three plaintiffs) to claim for any relief pursuant to the SPA, such as for the return of the RM1.5m allegedly paid by the plaintiffs to the defendant, as well as the purported agreed damages for another sum of RM1.5m which included the portions attributed to the first and second plaintiffs when these two manifestly disagreed with and disassociated themselves from the stand now taken by the remaining plaintiffs in the pursuit of this suit.

[24] The SPA plainly concerns five co-purchasers (the former first and second plaintiffs and the remaining three plaintiffs) who had previously agreed to jointly purchase one whole piece of land that is the said land from the defendant as the vendor. But the entire complexion of the suit has now drastically changed. And as stated earlier, the first and second plaintiffs had withdrawn themselves from the suit, on 29 September 2020. This must mean that the three remaining plaintiffs no longer possess the locus as the joint purchasers, *sans* the two other purchasers since all five of them had jointly contracted to purchase the said land.

[25] Learned counsel for the defendant correctly made reference to the decision in the case of *Yong Lai Ling (P) lwn Ng Seow Poe dan lain-lain* [2015]

8 MLJ 351 where the High Court held that an undivided or a joint owner of a land does not have locus to sue without joining the other joint owners. In that case, it was found that the plaintiff did not have any locus standi on her own to bring the action due to the fact that the interest in the said premise was not subdivided and was co-owned by another individual and the court could not speculate whether that other individual had agreed with the claim brought against the defendants. The relevant passages on this point merit reproduction hereunder:

> [41] Setelah meneliti saman dan pernyataan tuntutan plaintif di lampiran 2, saya mendapati hanya di perenggan 1, perkataan plaintif-plaintif digunakan manakala semua perenggan lain menggunakan perkataan plaintif. Walauapapun ternyata tuntutan ini hanya dibawa oleh seorang plaintif sahaja iaitu Yong Lai Ling dan tidak bersama Dr Pang Chu Yen iaitu pemilik bersama premis tersebut.
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> [42] Saya bersetuju dengan hujah defendan pertama dan defendan kedua bahawa plaintif juga dalam plidingnya tidak menyatakan bahawa Dr Pang Chu Yen telah memberi kebenaran atau tindakan ini dibawa bagi pihak beliau supaya tindakan ini boleh dikelaskan sebagai satu tindakan di bawah A 15 k 12 Kaedah-Kaedah Mahkamah 2012.
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> [43] Kes *Re Wah Hai Hing; ex p Choong Wai Wah & Anor* [1999] 5 MLJ 651 yang dirujuk oleh defendan pertama dan defendan kedua pada pendapat saya mempunyai prinsip yang sama di mana dalam kes ini sekiranya premis tersebut dimiliki bersama oleh dua pemiliknya, maka pemilik-pemilik tersebut hendaklah menjadi plaintif-plaintif dalam tuntutan yang dikemukakan. Tanpa Dr Pang Chu Yen hadir sebagai plaintif yang dinamakan, maka tuntutan ini telah dibawa tanpa pengetahuan Dr Pang Chu Yen. Mahkamah tidak boleh membuat spekulasi sama ada Dr Pang Chu Yen juga bersetuju dengan tuntutan yang dikemukakan terhadap defendan pertama dan defendan kedua.
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> [44] Berdasarkan hujah tersebut, saya bersetuju dengan defendan-defendan bahawa plaintif tidak mempunyai locus standi secara berseorangan untuk mengemukakan tindakan ini disebabkan kepentingan dalam premis berkenaan tidak dipecah bahagi dan dimilik bersama oleh Dr Pang Chu Yen.

[26] As such, in the instant case before me, albeit not yet the owners, the SPA had governed their relationship as the joint and co-purchasers to the undivided interest in the whole land in the said land, such that any claim against the said land under the SPA must be jointly filed by all the purchasers which comprised the two former plaintiffs and the remaining three plaintiffs. The remaining three plaintiffs alone do not have the requisite locus standi to maintain and continue with the present proceeding as the interests under the SPA in relation to the said land is undivided and jointly held amongst the five.

[27] And unlike in the case of *Yong Lai Ling (P)* the other purchasers herein (the first and second plaintiffs) had made their stand in not supporting the action taken by the other plaintiffs in this suit all too plain and obvious, as averred in the affidavit, as mentioned earlier.

[28] The remaining three purchasers as the three remaining plaintiffs clearly do not now have the requisite legal standing to maintain the instant suit for any relief relating to the said land under the SPA without the involvement of the former two plaintiffs in this suit to make up the entire collective co-purchaser group of five against the defendant. The two have an undivided interest in the said land together with the other remaining three and have a corresponding stake in the aggregate payment of RM3m demanded in the suit to be repaid to the original five plaintiffs.

[29] The continued pursuit of this suit by the three plaintiffs would in my judgment mean that they are maintaining a frivolous and vexatious action and at the same time committing an abuse of the process of this court.

Whether the foundation of the suit is still valid

[30] The one other reason, more significant than the earlier, as to why this court finds the suit unsustainable is this. This claim, which is premised on the SPA on the said land cannot be sustained because the remaining plaintiffs and the two other former plaintiffs had previously already decided to terminate the SPA and had also pursuant thereto returned the original copy of the issue document of title of the said land to the defendant, as shown in a letter from the solicitors for the plaintiffs dated 16 October 2017.

[31] In fact, the two former plaintiffs had averred in the affidavit that the SPA was merely one security for the purchase of another piece of land ('Land A') and was never intended to be enforceable between parties. The SPA was not a genuine agreement and that when a caveat on Land A was removed, the former first and second plaintiffs voluntarily with the other remaining plaintiffs signed the termination letter dated 16 October 2017 to terminate SPA and then caused the return of the original copy of the issue document of title for the said land.

[32] There were two letters. Both were issued on 16 October 2017 on behalf of all five purchasers. The first was a cover letter from Messrs Lee & Lim which enclosed and returned inter alia the issue document of title of the said land to the defendant, and the second was a letter entitled 'Termination of Sale' also in relation to the said land.

[33] In light of these averments, well-substantiated by clear documentary support, the claim made in the suit by the remaining plaintiffs for the payment of the sum of RM3m on account of the alleged failure of the defendant to deposit the issue document of title to the said land with the solicitors for the plaintiffs is manifestly devoid of merit. Instead this supports the position of the

defendant that the suit is frivolous, vexatious and a form of an abuse of process which ought to be struck out by this court.

[34] The SPA on the said land has so crystal clearly already been terminated by the two former plaintiffs and the remaining three plaintiffs since 16 October 2017. This, coupled with the return of the issue document of title to the said land by all of them to the defendant plainly means that the commencement of this suit subsequent thereto in 2019 cannot be sustained.

[35] Having elected to terminate the SPA, it necessarily follows that all rights under the SPA have also extinguished and ceased to exist. The remaining plaintiffs cannot, despite that, now seek the relief such as the liquidated damages under the SPA when the right to such relief no longer exists. In other words, they cannot approbate and reprobate. They cannot blow hot and cold.

[36] In the case of *Bakti Dinamik Sdn Bhd v Bauer (M) Sdn Bhd* [2016] MLJU 1878; [2016] 10 CLJ 247, I stated thus:

> [43] The position taken by the plaintiffs currently may be characterised as one which violated the principle against 'approbating and reprobating'. In the Court of Appeal case of *Visage Continental Sdn Bhd v Smooth Track Sdn Bhd* [2008] 1 MLJ 101; [2007] 6 CLJ 570, Richard Malanjum JCA (as His Lordship then was) referred to various authorities and enunciated clearly the rule that a party should not be allowed to approbate and reprobate as it is a practice that is both plainly unconscionable and unfair.

[37] The very foundation of the entire claim by the remaining three plaintiffs is that the defendant had allegedly failed to deposit the issue document of title of the said land to enable the purchasers to procure the transfer into their names. But this has now been shown to be an absolute untruth since the said title had been returned by the five purchasers to the defendant vide Messrs Lee & Lim (the plaintiffs' solicitors)'s letter dated 16 October 2017.

[38] In my view, additionally, the legal principle of estoppel should rightfully operate to prevent and disapprove of the inequitable conduct of the three plaintiffs in attempting to mount such an action at this juncture. Reference ought to be made to the decision of the Court of Appeal in *KGN Jaya Sdn Bhd v Pan Reliance Sdn Bhd* [1996] 1 MLJ 233, which held as follows:

> We are of the view that it would be a travesty of justice if we were to accede to the appellant's arguments. We are left in no doubt that the undisputed facts of this case admit of the conclusion that the respondent was, by the conduct of the appellant, lulled into the belief that the appellant had no challenge to the accounts, leave alone the legal relationship between the parties.

To put it another way, the appellant, by its silence coupled with other circumstances of the case, encouraged the respondent to believe that it intended to raise no challenge to the existence of a prior legal relation between the parties or to the figure which the account showed as owing by it. Having do so, it ought not to be permitted to now contend otherwise.

It follows that it does not, therefore, lie in the mouth of the appellant to now deny the respondent's claim. It would be plainly inequitable to do so. An examination of the facts leads us to this conclusion. The legal basis upon which such a conclusion may be sustained is well-settled and it is now beyond question. See *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Berhad* [1995] 3 MLJ 331.

[39] At the same time, nor can the remaining three plaintiffs exhibit any evidential support that the said termination by them was intended to be effective only if and after the such purchase consideration and other monies had been refunded by the defendant to them.

[40] There is no contemporaneous letter, no email or any document to such effect at all or in any manner showed that the termination was conditional in nature. Yet they through their solicitors did in October 2017 issue the termination letter and the letter returning the issue document of title. In any event the two former plaintiffs had confirmed that they had signed the termination.

[41] Further, it would, I think, have been very improbable, should there have been a condition to the termination, that the issue document of title was released before receipt of the relevant payment.

[42] And in fact, the remaining plaintiffs had also not been able to show any evidence that as purchasers in the SPA, they had made any payment towards the purchase consideration of the said land under the SPA. After all the defendant's case is that the SPA is a sham agreement such that the defendant had never received any payment from the plaintiffs.

[43] Moreover, I cannot but agree with the submission of the defendant that prima facie evidence which can be produced ought to be produced in a striking out application, which the three plaintiffs failed to do, and that bare allegations would not suffice (see *Supputetchimi v Palmco Bina Sdn Bhd* [1994] 2 MLJ 368).

[44] The suit is as such clearly an afterthought, and as argued by the defendant, could have been intended to exert unnecessary pressure on the defendant. This is an abuse of court's process. It needs no reminding, as I have already stated earlier, that the categories of abuse of process of the court are never closed (see *Jasa Keramat Sdn Bhd & Anor v Monatech (M) Sdn Bhd*, and

A the court always has an inherent jurisdiction to prevent an abuse of its process (see *Raja Zainal Abidin bin Raja Haji Tachik & Ors v British-American Life & General Insurance Bhd*).

B **[45]** For the record it should also be mentioned that only the fifth plaintiff filed an affidavit in reply to this striking out application, and even this was made long after the main written submissions were filed by the defendant (since there was no affidavit in reply for some time). The fifth plaintiff's affidavit is very late and way out of time and on top of that filed without any application for extension of time. Still, despite all these irregularities and
C notwithstanding the assertion by the defendant that this was a deliberate tactical manoeuvre on the part of the remaining three plaintiffs, this court decided to accept the same, take this into account and even asked that the remaining plaintiffs filed their written submissions before the hearing.

D

[46] I ought however to also in this regard make reference to the leading judgment of the Supreme Court on the issue of evaluation of affidavits in *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400 which held as follows:

E
> Under an O 14 application, the duty of a judge does not end as soon as a fact is asserted by one party, and denied or disputed by the other on affidavit. Where such assertion, denial or dispute is equivocal, or lacking in precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent or is inherently improbable in itself, then the judge has a duty to reject such assertion or denial, thereby rendering the issue as not triable. In our opinion,
F unless this principle is adhered to, a judge is in no position to exercise his discretion judicially under an O 14 application. Thus, apart from identifying the issues of fact or law, the court must go one step further and determine whether they are triable. This principle is sometimes expressed by the statement that a complete defence need not be shown. The defence set up need only show that there is a triable issue.

G

[47] Although the case concerns a summary judgment application, the principle on affidavit holds true as a general rule. Thus, having evaluated the facts and examined the law arising from this instant case, I find that the averments made by the remaining plaintiffs (in fact by the fifth plaintiff) are
H largely unsubstantiated, equivocal and considerably at variance from and not consistent with either the clear position in law or the undisputed contemporary documents, which largely originated from the remaining plaintifs themselves. The resistence of the three remaining plaintiffs to this application is futile and must therefore fail.

I

[48] It is also trite that mere bare denials or assertions do not constitute evidence and they cannot give rise to triable issues (see the Court of Appeal decision in *Chen Heng Ping & Ors v Intradagang Merchant Bankers (M) Bhd* [1995] 2 MLJ 363).

CONCLUSION

[49] In conclusion, when regard be had to the affidavit evidence filed by parties in this application in respect of the grounds to strike out the counterclaim under items (b) and (d) of O 18 r 19(1), I would without hesitation hold that it is manifest that this writ action by the remaining three plaintiffs against the defendant to be vexatious, frivolous and an abuse of process. I find it difficult to fathom how this would not be the case. The claim by the plaintiffs is so obviously unsustainable. It should be struck out Incidentally, this is a surer ground to strike out as against the assertion that there is no cause of action under limb (a) of r 19(1) since in this case, to establish the same, reference ought still to be made to the affidavits of parties.

[50] In view of the foregoing reasons, I find that the defendant has more than succeeded on a balance of probabilities to establish her case for the striking out of the writ action filed by the remaining three plaintiffs for being obviously unsustainable under item items (b) and (d) of O 18 r 19(1) of the RC 2012. The application in encl 95 is therefore allowed with costs.

Application allowed.

Reported by Ashok Kumar